IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION No. 5:12-CV-47-BO

CYNTHIA SMALLWOOD,)	
Plaintiff,)	
v.)	ORDER
IRWIN MORTGAGE CORPORATION, et al.,)	
Defendants.)	

On February 28, 2013, Cynthia Smallwood ("plaintiff") filed a complaint against several defendants including Irwin Mortgage Company ("Irwin") [D.E. 1]. In sum, this action relates to foreclosure proceedings involving plaintiff's home. On September 4, 2012, plaintiff filed an amended complaint [D.E. 26]. On February 27, 2013, plaintiff filed a motion for entry of default against Irwin [D.E. 40]. For the reasons explained, plaintiff's motion for entry of default is denied.

According to plaintiff, Irwin was served with the summons and complaint through the office of the Secretary of State on June 4, 2012. Plaintiff alleges that Irwin's answer or other response was due on June 25, 2012. Under Rule 55(a) of the Federal Rules of Civil Procedure, plaintiff seeks entry of default against Irwin in light of its failure to file an answer or responsive pleading. However, it appears that plaintiff's amended complaint contains allegations against Irwin that were not included in the original complaint. Plaintiff's amended complaint failed to contain a certificate of service, and plaintiff did not otherwise show that Irwin was served with the supplemental pleading.

Rule 5(a)(2) of the Federal Rules of Civil Procedure provides that "[n]o service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief must be served on that party under Rule 4." Although Irwin had not appeared when plaintiff filed the

amended complaint, plaintiff had not yet moved for entry of default. Thus, Irwin was not technically in default and should have been served with the new pleading. Accordingly, plaintiff's motion for entry of default against Irwin Mortgage Corporation is DENIED as moot as a result of the amended complaint [D.E. 40], and the clerk will reissue summons as to this defendant.

SO ORDERED. This 12th day of April 2013.

Julie A. Richards, Clerk of Court